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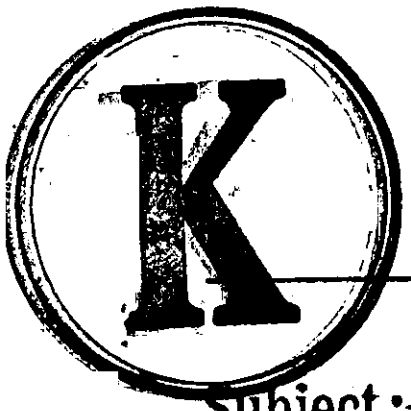
File No. O.I.P.C./147



Legal DEPARTMENT

A BRANCH

Subject:—

Opinions under the Indian Penal code.

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File No. O.I.P.C./47

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C O N T E N T S.

Legal Department File No....O.I.P.O./47

Sr. No.	Compilation No.	Subject.	Pages.
		Opinions under the Indian Penal Code.	
		409 and Sections 477A.	
1.	O.No.27-Compl. 23-1-1947.	Whether Mr.Kanjan can now be successfully prosecuted for the offence under ~~----~~ sections 409 and 477A.	1 -2.
2.	O.No.537-Compl. 9-12-1946	Section 124-A Whether Mr. K.M.Munshi may be prosecuted for his speech delivered at Jalgaon on 12-8-1946.	3- 10.
	O.No.359-Compl. 19-12-1946.		
	O.No.45-Compl. 31-1-1947.		
3.	O.No.62-Compl. 13-2-1947.	Section 505. Whether the speech of Shri.K.M.Munshi will fall under sec. 505.	19 -20
4.	O.No.1212 (-2-1947.	Sections 153 A and 505 Whether Mr. Sayed Nasir Hussain can be prosecuted.	21 -22.
5.	O.No.2/50 13-3-1947.	Section 124 A and 131 Whether the articles dealing with RIP Mutiny of 1946 are objectionable.	23 -24.
6.	O.No.272-Compl. 19-4-1947.	Sections 124A, 153 A and 505 Whether the speech of Mr.A.B.Shaikh criticising the policy of the H(D) is objectionable.	25 -26.
7.	O.No.207-Compl. 21-11-1946	Sections 17 and 20A. The Prize Competition Act, Section 3(2) Sale of tickets in Ahmedabad in Dev Agricultural College, Ajmer.	27 -32.
	Adv.Genal's Opinion No.42/46.		
	O.No.11-Compl. 6-1-1947.		
8.	O.No.2033 9-7-1947	Section 21. Whether sanction for prosecution of Mr.H.J. Asher, Assistant Superintendent of Cotton is necessary. Whether sanction already accorded is correct.	33-36.
	D.I.G.No.230-Compl. 10-7-1947.		
9.	O.No.2018 15-7-1947.	Section 279. Whether there is any legal objection for prosecuting the French Vice-Consul Monsieur Fredrick Leon Ilan for offence under section 279.	37-38.
10.	O.No.2074 25-7-1947.	Sections 400 and 415.	(P.T.O.

10.	(in contd.....)	Whether the excess amount paid to Mr.Kulkarnian should be received by prosecution. Who was responsible for making double payment.	37-40.
11.	Q.No.8200 13-8-1947.	Section 182. Criminal Procedure Code 1870. Section 193 (1) (a) Who should file a complaint for prosecuting one Mr.Garud who has made false allegations against a certain officer in Kolaper Distt. in his application to H.E.H.	41-42.
12.	Q.No.9333 19-9-1947.	Section 182. Whether Mr. Bahlenkar can be prosecuted for sending a false complaint.	43-44.
13.	Q.No.9733 6-10-1947.	Section 182. Prosecution under	45-46.
14.	Q.No.10414 6-11-1947.	Section 342. Unfair advertisement.	47-48.
15.	Q.No.10824 11-11-1947.	Section 410 and 411. Prosecution for receiving stolen property.	47-50.
16.	Q.No.11550 3-12-1947.	What are the observations of Mr.Chabe that"a son of one of the present Ministers is doing some business by taking advantage of his fathers' official position" are defamatory.	51-52.
17.	Q.No.11[illegible] 13-12-1947.	Section 292 Whether the book "Rahi Kavita" by Mr. B.G.Mardhekar is obscene.	53-56.
18.	Q.No.11701 10-12-1947.	Section 124-A Disrespect to National Flag.	57-58.
19.	Q.No.439-Conf. 22-12-1947.	Prosecution of Sardar Hanumanji for drawing false T.A. bills.	59-60.

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cur/S.J.

The view taken by the Senior Police Prosecutor in his opinion at p. 53 of the file is correct.

To sustain a charge under section 477A of the Indian Penal Code it is necessary to prove falsification of account with intent to defraud i.e. with an intention to deceive and by means of deceipt to obtain an advantage or with an intention that injury should befall some person or persons (see Ratanlal's Law of Crimes p. 1183). What is alleged in the present case is that an amount of Rs. 263-12-0 was debited as being paid by a cheque to Ganpat Dhondiba and Ranganath Bros. Firm as price of wood supplied ~~unterwatching~~ ~~Dhondibaurant~~ ~~untrue~~ for repairs to a ferry boat though in fact that firm supplied wood worth Rs.111-11-0 and returned the balance for payment to other contractors who supplied the balance of wood required for the purpose. This may prove falsification, but there is nothing to prove that it was done with intent to defraud, for Government did not suffer any injury thereby when wood worth that amount was supplied to Government, nor did Mr. Narayan Rao who made the payment by cheque obtain any advantage. It is at most an irregular accounting. Consequently the prosecution of Mr.Narayan Rao for the offence under section 477-A I.P.C. cannot be sustained.

The next question for consideration is whether Mr.Narayan Rao can be successfully prosecuted for the offence under section 409 I.P.C. "A person accused of criminal misappropriation has not to account for the money, and when he has stated how the money was spent it is for the prosecution to disprove the alleged expenditure. It is wrong to hold that unless a person accused of criminal breach of trust himself proves the truth of every item of expenditure alleged by him he cannot rely on such payments as a defence. On the other hand, if the statement of account is otherwise reasonable or probable the accused is entitled to the benefit of the statement of expenditure submitted by him unless and until that statement is proved to be false" (see Ratanlal P. 1024). In the present case it is undisputed that an amount of Rs. 263-12-0 was paid by a cheque as shown in the account to Ganpat Dhondiba and

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and Rangnathdangonath Bros. Firm for wood supplied to Government. It is true thatxxx that wood worth Rs. 111-11-0 only was supplied and the balance was returned by the firm. It is not possible to definitely to prove that that balance was returned to Mr.Narayan Rao. In all probability it was paid to the overseer Mr. D.G.Patil who paid it to two other contractors who supplied wood. It appears that an amount of Rs. 6-5-0 out of the balance returned by Ganpat Chandiba and Rangnath Bros. Firm remains unaccounted for. But in the absence of any definite and reliable evidence it cannot be contended that the amount remained with Mr.Narayan Rao. It is possible that the amount may be with Mr.D.G.Patil. Consequently Mr. Narayan Rao cannot be successfully prosecuted for the offence under section 409 I.P.C.

Dd.
Remembrancer of Legal Affairs.

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Office of the R.L.A.

Mr. K.H.Phadke of Poona in course of his speech delivered in a meeting held at Jalgaon on 12th September 1946 has traced the events that led to the recent Police firing at Amalner, blamed the District Magistrate and the District Superintendent of Police, East Khandesh for the loss of life suffered by the workers, outlined the differences between the Congress and the Communist Party criticised the attitude adopted by the Congress leaders and the Ministry towards the demands for an independent inquiry into the said firing, said to have been made by the Girni Kamgar Union, Amalner.

The speech read as a whole appears to tend to bring into hatred or contempt and excite disaffection towards the Government established by law in this Province. Mr.Phadke may therefore be prosecuted under section 124A,I.P.C., for delivering this speech.

Sd/-

Remembrancer of Legal Affairs.

U.S. to H.D.(Spl.), No. 337-Conf.l., dated the 9th December 1946.

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Office of the R.L.A.

STATEMENT OF THE CASE.

Mr. K.N. Phadke of Poona in course of his speech delivered in a meeting held at Jalgaon on 12th September 1946 has traced the events that led to the recent Police firing at Amalner, blamed the District Magistrate and the District Superintendent of Police, East Khandesh for the loss of life suffered by the workers, outlined the differences between the Congress and the Communist Party, critisdded the attitude adopted by the Congress leaders and the Ministry towards the demands for an independent inquiry into the said firing, said to have been made by the Girni Kamgar Union, Amalner.

2. As requested by the Home Department (Special), the speech was examined by the Remembrancer of Legal Affairs who, in his opinion No. 337-Confl, dated the 9th December 1946, observed as under

> "The speech read as a whole appears to tend to bring into hatred or contempt and excite disaggection towards the Government established by law in this Province. Mr. Phadke may therefore be prosecuted under section 124 A, Indian Penal Code, for delivering this speech"

The Secretary, Home Department, however, thinks that the speech may come under section 503 ‡or section 153-A, Indian Penal Code but not ~~under~~ under section 124-A, Indian Penal Code, and has desired that the matter should be reconsidered.

3. The offence of sedition as defined in section 124-A, Indian Penal Code, consists in exciting or attempting to excite in others certain bad feelings towards the King-Emperor or towards the Government. The provisions of this section are very wide and in strict law they would cover everything that amounts to defamation of the Government if one excludes from the meaning of that term any criticism in good faith of any particular measures or any acts of administration. (Permanand vs. Emperor, A.I.R. 1941, Allahabad p. 156). The offence does not consist in "exciting or attempting to mutiny or rebellion, or any sort of actual disturbance, great or small. (Queen Empress vs. Bal Gangadhar Tilak and Keshav Mahadeo Bal, 22 Bom. 112 at 135.)

It is sufficient for the purposes of the section that the words used are calculated to excite feelings or ill will against the Government and to hold it up to the hatred and contempt of the people and that they were used with the intention to create such feeling (Queen Empress vs. Jogendra Chunder Bose and others, 19 Cal.P. 35, at 44). If the predominant idea of a speech is to bring the Government and their supporters into hatred and contempt and raise hostile feelings against them the section will apply (Sachindar vs. Emperor, 63 Cal. p. 588). The Federal Court of India has, however, held that public disorders or the reasonable anticipation or likelihood of public disorderx is the gist of the offence and that the acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that that is their intention or tendency (Niharendu Dutt Majumdar vs. The King Emperor, 1942,F.C.R. p. 38). This decision of the Federal Court of India has been followed by the Bombay High Court, in Emperor vs. Sadashiv Narayan Bhalerao, 46, B.L.R. p. 459-466-67), as it is a Court of superior authority, but it does not agree with the principle laid down by it.

The essence of the crime of sedition consists in the intention with which the language is used. But this intention must be judged primarily by the language itself. Intention for this purpose is really no more than the meaning of the language used by the speaker or the writer (28, Bom. p. 112). The perusal of the passages sidelined in pencil will go to show that the speaker has not only severely attacked the local officers, like the D.S.P. and the D.M. for the Amalner police firing, but has criticised in highly objectionable language particularly the attitude of the Hon'ble Minister, Home and Revenue, and the Hon'ble Minister for Labour towards the demand for an independent inquiry into the said firing said to have been made by the Girni Kamagar Union, Amalner.

It is quite possible as observed by Rankin in Emperor vs. Satya Ranjan Bakshi (56, Cal. 1085, at p. 1089) by abuse of Government officials as officials to make an endeavour to bring into hatred or contempt the Government established by law in British India. In Hamendra Prasad Ghosh vs. Emperor, (2 Cal. p.411), it has, no doubt, been held that the ministers are not "the Government" within the meaning of section 17 and 124-A of the Indian Penal Code.

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But their Lordships of the Privy Council have observed in Emperor vs. Nibenth Banerjee (1945, F.C.R. p. 195 at 222), that they are unable to accept a suggestion for the respondents that the Home Minister is not an officer subordinate to the Governor within the meaning of section 49(1) of the Government of India Act, 1935, and so far as the decision in Emperor vs. Hemanta Prasad Ghosh decides that a minister is not such an officer, their Lordships are unable to agree to it, and that while a minister may have duties to the Legislature, the provisions of section 57 of the Government of India Act 1935, as to the appointment payment and dismissal of ministers and section 59(3) and (4) of the Act, and the Rules of Business made by virtue of section 59 place beyond doubt that the Home Minister is an officer subordinate to the Governor.

The cumulative effect of the passage referred to above in all probability, must have been to excite ill feelings and ill will against the Government and to hold it up to the hatred and contempt of the workers who were already so highly strung up. From the language used in these passages and particularly those marked as 'A' and 'B', it may reasonably inferred that the intention of the speaker was not only to create such feelings, but also to encourage the workers to adopt defiant and militant attitude, and to incite them to resort to violence if their demands are not satisfied. Therefore the speech read as a whole would, it seems, come within the mischief contemplated by section 124-A, Indian Penal Code.

Section 153A, Indian Penal Code, means that no subject of the Crown is entitled to write or say or do anything thereby the feelings of one class of His Majesty's subjects will be inflamed against another class of his subjects. This section would not apply to the present case, as the main idea underlying his speech is not to promote feelings of enmity and hatred between any two well defined classes of His Majesty's subjects as contemplated therein. As the speech read as a whole does not show that the intention of the speaker was particularly to intimidate, insult or annoy the owner of the Amliner Mill, it would not, it seems, come even under section 503, Indian Penal Code.

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4. In view of the several cases pointed out above, I would very much welcome the opinion of the Advocate General on the point whether the speech would fall under section 124-A, Indian Penal Code. The Advocate General is requested to treat the case as very urgent.

Sd/- D.V.Vyas
Remembrancer of Legal Affairs.

U.R. to the Advocate General, Bombay, No. 353-Conf.
dated the 19th December 1946.

SMT/S.S.

CONFIDENTIAL. No. 2 of 1947.

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ADVOCATE GENERAL'S CHAMBERS,
HIGH COURT,
Bombay, 13th January 1947.

U.O. to the Advocate General, Bombay, No.353-Confl.
dated the 19th December 1946.

OPINION.

I regret that I am unable to concur in the opinion of the Remembrancer of Legal Affairs that the speech offends against Section 124A of the Indian Penal Code; mainly because of the judgment of the Federal Court in Niharendu V. King-Emperor page 38, 1942 Fedral Court Reports.

That judgment, followed, though only because it is the judgment of a superior Court, in 46 Bom.L.R. page 459, and for no other reason, has put a different complexion on Section 124A - though it dealt not with that Section, but with Rule 34(6) of the Defence of India Rules. It has been said in the case in 46 Bom.L.R. at 459 that the Section and the rule are practically identical. According to the Federal Court judgement, public disorder or a reasonable anticipation, or likelyhood of disorder is the gist of the offence. It is in that light that the speech in question has to be read.

As I see it, the essence of the speech is that the —— speaker deplores the refusal of Government to hold an enquiry into the firing, suggests that an enquiry is essential, and calls upon the people of Amalner to join in assisting the —— victims of the firing. There is great deal of comment interspersed upon employers, local congressmen, and the D.S.P. and D.M., and two of the Ministers. The comment, particularly as to the D.S.P. is couched in harsh and even offensive terms. It is suggested that the D.S.P. has lied when he says he was injured. The D.M. is called a fool. It is suggested that the Ministers have also supported untruths and that their action has not been fair or even honest. But for the Federal Court judgment, on the earlier cases, a fair case could be made out under Section 124A. The words used are calculated to create hatred and contempt.

But it is difficult to say that they incite to violence or public disorder. It is one thing to have comment, which borders on vituperation and creates hatred or contempt, and another to say that comment because it is of such a —— nature, necessarily incites to disorder.

There is in my opinion no direct incitement. Can it then be said that upon a fair reading, the speech has an intention of creating as a tendency to create public disorder?

Section 124A created a criminal offence and the burden would be heavily on the prosecution to make out the intention o likelihood. There is in the speech no indication of any future action, except as to assisting the victims and perhaps a suggession that workers might break the lock and take possession of the mill. The passage "A" is the only one in the whole speech which may perhaps be said to come within the Federal Court decision. But this passage is couched in the form of a statement of the workers' rights. No doubt a statement as to rights may lead people to exercise them. But the gist of the same speech is not directed to the actual fight between the employer and workers, but to the firing. The allusion to the workers' rights is incidental. I do not think that that passage would be read as amounting to an offence under Section 124A. Passage (B) is in my opinion a metaphrical one. The firing there referred to is "public-comment" and not actual firing.

Having regard to the fact that the burden on the prosecution would be a heavy one, I do not think that the speech can successfully form the bases of a charge under Section 124A.

Section 503 I think is inappropriate, and I agree with the Remembrancer of Legal Affairs in what he says as to that Section and 153A.

I should add that but for the Federal Court decision the position might be different and I have no doubt that—— if a matter of this nature went to the Privy Council the —— result would be in accord with the opinion expressed by the Privy Council in 1940 Appeal Cases.

Sd/- C.K. Daphtary

Advocate General.

SIT/3.5.

Office of the B.L.A.

A copy of the Advocate General's opinion is forwarded herewith. As stated by him the Advocate General has disagreed with the B.L.A. mainly because of the judgment of the Federal Court in Niharendu V. King Emperor (p.38, 1942 Federal Court Reports). That decision of the Federal Court was followed by the Bombay High Court in King Emperor V. Sadashiv Narayan Bhalerao against which this Government has preferred an appeal to the Privy Council, and that appeal is still pending. That apart, even on facts it is possible to infer that the speech read as a whole contains an incitement to violence; but it is doubtful what view the Courts may take.

Sd/- D.V.Yegna
Secretary of Legal Affairs,

U.P. to H.D. (Special), No. 45-Conf., dated the 31st January 1947.

SM/G.S.

Office of the H.I.A.

Section 505 of the Indian Penal Code

Provides

Whoever makes, publishes or circulates any statement, rumour or report, i—

(a) with intent to cause, or which is likely to cause, any officer, soldier, sailor or airman in the Army, Navy or Air Force of Her Majesty or in the Imperial Service Troops to mutiny or otherwise disregard or fail in his duty as such; or

(b) with intent to cause, or which is likely to cause, fear or alarm to the public or to any section of the public whereby any person may be induced to commit an offence against the State or against the public tranquillity;

(c) with intent to incite, or which is likely to incite, any class or community of persons to commit any offence against any other class or community,

shall be punished with imprisonment which may extend to two years, or with fine, or with both.

Exception :— It does not amount to an offence, within the meaning of this section, when the person making, publishing or circulating any such statement, rumour or report, has reasonable grounds for believing that such statement, rumour or report is true and makes, publishes or circulates it without any such intents as aforesaid.

No doubt the passages marked A and B in the speech of Mr. K.H. Phadke contain an element of incitement to violence; but here there being nothing to indicate that the violence contemplated was intended to assume the form of an offence against the State or the public tranquility or against any other class or community, the speech will not fall under section 505 Indian Penal Code.

Sd/- D.V.Vyas

Remembrancer of Legal Affairs.

U.S. to H.D. (Spl.) No.62-Confl., dated the 12th February 1947.

GMZ/S.S.

Office of the R.L.A.

I am of the opinion that under the cloak of a religious war on India, such a clear incitement to acts of violence cannot be given without the incitement amounting to an offence. The talk of enforcing Islam "on the Kafirs of India" with "all arms and ammunitions" must to my mind amount to a promotion of feelings of enmity and bitterness between the two communities. Attempt at forcible conversion with the aid of all arms and ammunitions must obviously amount to an incitement to acts of violence. I am of the opinion that action can be successfully taken under sections153A and 505 of the Indian Penal Code and under section 18 of the Indian Press (Emergency Powers) Act, 1931.

2. I have informally discussed this question with the Advocate General and he too is of the same opinion as mine.

3. Explanation to section 153A of the Indian Penal Code will be of no avail in this case since it would not be successfully contended that the writer or the distributor of this pamphlet was honestly pointing out matters which were producing or had a tendency to produce feelings of enmity or hatred between the two communities with a view to the removal thereof. Similarly, Exception to section 505 of the Indian Penal Code will also not apply since it could not possibly be contended with any hope of success that the writer and the distributor of this pamphlet were not actuated with intent to incite one community to commit offences against another community. Talking of enforcing Islam "on the Kafirs of India" with "all arms and ammunitions" must certainly reflect in the clearest possible manner an intent to incite one community to do acts of violence against another community. The provisions of section 18 of the Press Act will also apply. In short, the person concerned can be successfully prosecuted under any or all of the aforesaid sections.

D.V.Vyas

Secretary to Govt. of Legal Affairs.

H.H. to H.D., No. 1222, dated the 6th February 1947.

SHR/H.D.

Office of the R.I.A.S.

The article at pages 5-7 deals with the R.I.N. Mutiny of 1946. While describing the causes, the progress and the end thereof the author has tried to show that the civilians supported the R.I.N. strike and suffered thereby and that the strike was called off at the intervention of the Congress and League leaders who held out promises of adequate relief to the strikers, but the Congress and the League though now in the interim Government have failed to fulfil their promises and even today the British rule the navy insolently, violently and brutally and they should beware that the spirit of revolutionary awakening a year ago is not dead The article ends with a homage to the R.I.N. strikers, to the martyrs of Bombay to the millions who saw the significance of the great event.

The second article at pages 13-15 ante discribes the details of the mutiny. In doing so the author has stated that the R.I.N. strikers first rushed to the Gateway of India to look across to the British ships from which the British flag had been hauled down and saw three flags were flying and one of them was shot dead by the British soldiers, but the strikers did not give in. They became ready to face the bullets and die for the cause. The news of the strike spread to the civilians who in sympathy with the strikers started barricading all streets with the xxxx result that street fighting continued for three days between the British soldiers and the civilians who showed unparalleled heroism.

These two articles describ the events that took place a year ago. Since then enormous political changes have taken place and are also excepted in the near future. The articles also do not contain any direct incitement to violence, nor any attempt in rude to reduce the navy. In the circumstances they do not appear to come within either section 124A or section 131 Indian Penal Code or any of the provisions under section 4(1) of the Press (Emergency Powers) Act, 1931.

The cartoon at page 3 ante depicts the Indian rating defending the three Indian flags on the ship against the attack of the British soldiers and the cartoon at page 11 ante, the suffering of the people during the R.I.N. strike. These cartoon may excite bitter feelings against the British. But in view of the impending political changes no action appears expedient.

U.S.to H.D.(Poll.) No. 2460 dated the 13th March 1947. Sd/- D.V.Vyas
Secretariat of Legal Affairs.

SMT/S.S.

Office of the R.L.A.

The three objectionable features of this speech are apparently (1) its criticism against the Honourable the Home Minister, (2) its tendency to foment ill-will between Hindus and Muslims, and (3) its exhortation not to fear the Police.

2. As regards (1), please see my note in the linked case of an article written in the 'Watan' by this same gentleman. For the reasons given therein, it is difficult to hold that this feature of the article would become actionable under section 124A of the Indian Penal Code.

3. Under the second head, the speech must be read as a whole. When so read it appears that its object is to organise assistance to the Muslims in the event of riots. It is, therefore, difficult to hold that the speech attempts to promote enmity or hatred between Hindus and Muslims with that malicious intention which is necessary for the offence under section 153-A Indian Penal Code.

4. Under the third head, it must be observed that asking people to shed the fear of the Police is not the same thing as inciting them to commit offences. The exhortation not to fear the Police cannot, without straining language unduly, be construed as publishing or circulating statements of the kind contemplated by section 505(b) and (c) of the Indian Penal Code.

5. In my opinion, therefore, the speech would not come under any of the three sections 124A, 153A, or 505 of the Indian Penal Code.

Sd/- P.M.L

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Remembrancer of Legal Affairs.

U.O. to H.D.(Spl.), No. 272-Confl., dated 19th June 1947.

SHP/9.5.

Office of the H.L.A.

The attention of the Advocate General is invited to H.L.A.'s opinion No. 647-P-Confl, dated the 6th October 1946 and the H.M.(L.)'s note at p. 18 ante. He is requested to favour Government with his opinion in the matter and also to state whether he concurs in the then Advocate General (Mr. Setalvad)'s opinion No.17, dated the 19th April 1940. The case may please be treated as very urgent.

12. P.N.M

Remembrancer of Legal Affairs.

U.H. to the Advocate General, No. 277-Confl, dated the 11th November 1946.

SM/9.5.

No.42/46.

Office of the Adv.Genal.

21.XII.46.

Sale of tickets in Ahmedabad.
for Dav. Agricultural College,
Ajmer.

There is no offence, so far as I can see, under sec.294A of the Indian Penal Code, in two reasons. The first is that the process by which funds are being raised for the D.A.V.College is not a college within the meaning of ~~kakxxx~~ that section, there being no physical drawing of one number of ticket form a mass of bundle or lot of numbers. Two High Courts have held that a scheme in which there is no drawing of lots, does not come within the section. ~~xx~~.of 1917. Criminal Law Journal 768, and 30 Bom. L.R. 14 L.C. 1434.

The second reason is that even if it is a lottering within the meaning of the section, it has been authorised by "Government". Government is deprived by sec. 17 of the Penal Code as denoting the person or persons authorised to administer executive Government in any hand of British India. The Chief Commissioner Ajmer however is the person authorised to administer the executive Govt. of that province. The Genl. Clauses Act defines Govt. as including the Central & Provincial Government. The effect of secs. 3(a) (b) & cl. 18(a) of that act read together show, as stated by the A.L.A. in his note, that the Commissioner is the Provincial Govt. the lottering has been duly authorised.

The next point is whether this scheme is a prize competition, within this meaning of the Bombay Prize Competition act,1939. I see no good ground for differing from the opinion given by Mr. M.C.Setalwad, advocate general dated 19.4.40, no.17 of 1940 at page 37 of the file. This College lottery is a number prize competition. It is also a competition in ~~xxx~~ where this solution is prepared before hand. I accept this meaning attached to the word competition by Mr.Setalwad. If a competition on which this solution is determined by lot is a prize competition (see sec. 2 (2)(a)), it is clear that this word competition is used for the act as such necessarily involving any element of skill at all.

Sd/- C.K.Daftary

21-xii-46.

SXT/9.5. U.O. to H.D.No.647 p. Confl./ Note to H.D.No.11.Confl. dated 8.1.1947.

Office of the R.L.A.

Under description "ninth" of the descriptions mentioned in section 21 of the Indian Penal Code read with Explanation 1 thereto every officer in the service or pay of the Crown for the performance of any public duty is "public servant". The word "officer" means a functionary or holder of some office however humble to whom in some degree are delegated certain functions of Government (vide p.51 of Ratanlal's Law of Crimes). The expression "officer in the service or pay of the Crown" means one who is appointed to some office for the performance of some public duty (62. 23 Cal. 344). It is not known whether the post of Assistant Superintendent of Godowns at Rayan Grain Market requires the incumbent to perform some public duty. Rather than allow the prosecution to fail on the technical ground it would be desirable to grant sanction for prosecuting Mr. M.J.Akbar, Assistant Superintendent of Godowns at Rayan Grain Market under clause (c) of section 6 of the Prevention of Corruption Act, 1947.

It appears that the Government Resolution signed by Assistant Secretary to Government and Personal Assistant to Food Controller for the Supply Commissioner Mr. Booth is irregular (see 50 Cal. 135) and the fact that the office copy is signed by the Supply Commissioner may not regularise the position (see R.L.A's opinion No. 6463, dated 26-11-1946). Consequently a fresh Government Resolution signed by the Supply Commissioner himself should be issued since the power to grant sanction for prosecution vests in him.

Sd/- D.V.Vyas

Remembrancer of Legal Affairs.

U.O. to C.J.D., No. 7033 dated the 9th July 1947.

SMT/9.9.

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Prosecution.
Mr. Asher, H.J.
Assistant Superintendent,
Mayan Grain Market,
Civil Supplies Department, Godown.

Government of Bombay,
Civil Supplies Department,
Resolution No.2067/46-D,
Bombay Castle, 9th July 1947.

Read:- 1) Letter No.544 of 1947 dated the 18th April, 1947, A.C.B.

from the Deputy Commissioner of Police, Anti-Corruption Branch C.I.D., Bombay, to the Food Controller, Bombay.

ii) Reference dated the 11th June 1947, from the Food Controller, Bombay.

RESOLUTION:- Whereas in the month of April, 1947, Mr. H.J.Asher, held the post of the Assistant Superintendent of Godowns at Mayan Grain Market under the Food Controller, and as such was a public servant not removable from his office save by or with the sanction of the Supply Commissioner and Secretary to Government, Civil Supplies Department.

And whereas the said Mr. Asher, while acting or purporting to act in the capacity of his official duties is alleged to have committed an offence of accepting illegal gratification, and whereas it appears to the Supply Commissioner, and Secretary to Government, Civil Supplies Department, that the said Mr.Asher, has thereby committed an offence punishable under Section 161 of Indian Penal Code.

Now,therefore, in exercise of the powers conferred by clause (c) of Section 6 of the Prevention of Corruption Act 1947 (India Act II 1947 the Supply Commissioner and Secretary to Government, Civil Supplies Department, hereby sanctions the prosecution of Mr.Asher, for the said offence.

By order of the Governor of Bombay,

Sd/-

Supply Commissioner &
Secretary to Government.

R.L.A.
Establishment Officer, Civil Supplies Department,
Home Department,
Deputy Commissioner of Police, with reference to his letter No.771 A.C.B. dated the 31st May, 1947.

SMP/9.5.

Office of the H.L.A.

In civil and criminal cases, Consuls are subject to the local law in the same manner with other foreign residents owing a temporary allegiance to the State (see Wheaton's International Law p.482). There appears, therefore, no objection to prosecuting the French Vice-Consul Monsieur Frederick Leon Mat for the offence under section 279, I.P.C.

Sd/-

Remembrancer of Legal Affairs.

U.O. to H.D.,No. 7248 dated the 15th July 1947.

SM/9.5.

It is true that the facts of this case disclose a dishonest concealment of the receipt of Rs. 5784 from the Collector, Thana, whereby a double payment was facilitated, but a mere dishonest concealment of facts does not, it appears, amount to cheating under section 416 I.P.C. Explanation to that section no doubt states "A dishonest concealment of facts is a deception within the meaning of this section".

"Concealment or any facts which deceive a person must be dishonest; an improper concealment or a material fact, which the party concealing is legally bound to disclose, and of which the other party has a legal right to insist that he shall be informed, is fraudulent. Where the cheating consists in concealment it must be shown that suppressio veri was a violation of a legal duty or it was an illegal omission in fact" (see Bishan Das, 27 All 561; Ratanlal's Law of Crimes 15th edition p.1058). Under section 43 I.P.C. the word "illegal" is applicable to every thing which is an offence or which is prohibited by law, or which furnishes ground for a civil action and "a person is said to be legally bound to do" whatever it is illegal in him to omit. Consequently, the success or failure of the prosecution of Mr. Kulhanian for cheating would depend upon whether or not he was legally bound to disclose to the special Land Acquisition Officer the fact of his having received the payment of compensation from the Collector. There does not appear to be any law which required him to make such disclosure or made his default an illegal omission. Nor does it appear that the Special Land Acquisition Officer has a legal right to insist that he should be informed by Mr. Kulhanian of the receipt of compensation from the Collector. In the circumstance it appears that the mere concealment of the fact of receipt of compensation from the Collector would not be enough to resort to Explanation to section 415 I.P.C. The papers forwarded to L.D. do not disclose that Mr. Kulhanian made any dishonest representation inducing the Special Land Acquisition Officer to make payment. All that Mr. Kulhanian did was to appear before the Special Land Acquisition Officer in pursuance of a notice and receive payment. Consequently it appears very doubtful that Mr. Kulhanian's prosecution for the offence of cheating would be successful Mr. Kulhanian not being entrusted with property, his prosecution for the offence under section 406 I.P.C. is sure to fail.

(P.T.O.

It is presumed from para 3 of R.D. office note at p. 69 ante that the object of prosecuting Mr. Kulhanian may be to bring pressure on him to repay the amount; but it is doubtful whether such prosecution will have its desired effect when the legal position appears to be in favour of Mr. Kulhanian.

It is for the administrative department to decide whether Government itself should file a suit against Mr. Kulhanian for the recovery of the amount or find out who is responsible for the double payment and recover it from him leaving him to his remedy against Mr. Kulhanian.

Id. D.V.V.

Remembrancer of Legal Affairs.

U.R. to R.D., No. 7674; dated the 25th July 1947.

SHF/9.5.

Office of the R.L.A.

It appears that one Mr. Garud has made an application to H.P.H. making false allegations against a certain officer in Sholapur district and Government has decided to prosecute Mr. Garud for the offence under section 182, I.P.C. The question raised for the consideration of the R.L.A. is who should file the complaint.

Clause (a) of section 195(1) of the Criminal Procedure Code provides that no court shall take cognisance of any offence punishable under sections 172 to 188 except on the complaint in writing of the public servant concerned or of some other public servant to whom he is subordinate. In Emperor V. Sibnath Banerji (48 B.L.R. p.1) the Privy Council has held that a Minister is an officer subordinate to the Governor. Whether a minister is a public servant within the meaning of section 21 of the Indian Penal Code is not covered by any authority. As a Minister is an officer in the service or pay of the Crown, it cannot be seriously contended that he is not a public servant.

In view of the fact that the application being containing false allegations against a certain officer was addressed to H.P.H., I should think, having regard to the language of section 182, that the complaint should be filed by H.P.H. There is no doubt another alternative also, namely, that of asking the officer concerned to proceed against Mr. Garud for defamation at Government expense. Between the two alternatives, however, the filing of a complaint under section 182 of the I.P.C. is preferable in view of the fact that the sentence provided under section 500 of the I.P.C. is only simple imprisonment (of course with or without fine) whereas that under section 182 of the Code is imprisonment of either description (with or without fine).

Ld. D.V.V.

Remembrancer of Legal Affairs.

U.O. to C.S.D., No. 6260, dated the 12th August 1947.

SHR/9.8.

Office of the R.L.A.

The telegram sent by Mr. Bablechwar to H.M.(H) is in the following terms

"Sub Divisional Magistrate Sulambrakar

maliciously his urgent transfer requested"

The telegram is a clear imputation of malice to a Magistrate who was trying a case in which Mr. Bablechwar figured as the accused. It appears from the papers that similar allegations were made by Mr. Bablechwar even to the High Court and that Their Lordships have reserved for their consideration the question whether there is a case for taking disciplinary action against Mr. Bablechwar. This previous history and the High Court's expression of opinion has necessarily to be taken into account in judging the knowledge of Mr. Bablechwar in regard to the falsity of the allegations he has made. The relevant provision under which Mr.Bablechwar can be prosecuted is section 182 which requires that information should be given to a public servant - and it has been already held by the R.L.A. that a Minister is a public servant within the meaning of section 21 - which the person giving it knows or believes to be false etc. Presumably there is evidence to prove that the allegation of malice against the Magistrate Mr. Sulambrakar is false. It should not then be difficult also to establish that the information contained in the telegram was false to the knowledge or belief of Mr.Bablechwar. A prosecution under section 182 is, therefore, feasible provided the falsity of the allegation is capable of proof. The Magistrate can also take suitable action for defamation and further bring the telegram to the notice of the High Court to be considered for disciplinary action which the High Court is already contemplating against Mr. Bablechwar.

Sd/- P.M.L' .1619

Remembrancer of Legal Affairs.

U.O. to H.D. No. 9332, dated the 19/9/47.

sm/9.9.

Office of the R. In. A.

Prosecution under section 162.

Indian Penal Code.

Seen and returned.

A prosecution under section 162 I.P.C. would be feasible provided the falsity of the information can be demonstrated. In such cases, public policy would be better served if the aggrieved officer is directed to lodge a prosecution for defamation.

Prosecution by Government may discourage applications even in genuine cases.

Sd/- P.M.L. 3/10

Remembrancer of Legal Affairs.

U.O. to H.D.(Special), No. 9732, dated the 6th October 1947.

GIR/9.5.

Office of the R.L.A.

Re: Obscene advertisement.

Indian Penal Code.

The issue of Sanyukta Karnatak dated 31st August 1947, contains an advertisement about the "Sidha Kavacha" by wearing which one is guaranteed the attainment of all his ambitions whether good or bad. It is specifically stated that a wearer of this Kavacha can have any woman he likes and her youth will be his. The question raised for the consideration of the R.L.A. is whether this advertisement relates to any obscene matter within the meaning of section 292 I.P.C.

Except by unduly stretching language, it is difficult to hold that the advertisement is obscene, though it is certainly opposed to public morals. Advertisements, much more offensively worded, disfigure our newspapers. Newspapers similarly publish all sorts of advertisements of aphrodisiacs, medicines, and cures; the goods so advertised are not only fraudulent but in most cases deleterious. The time has come to control advertisements by some legislative measures. That has been done in America: and I believe that public opinion in this Province is ripe for some effective action as I could gather when I spoke on this subject two years ago in the Poona Spring Series. I suggest that a small committee consisting of Secretary, Home Department, Secretary, Legal Department and two leading persons connected with the Press (say like Mr. Brelvi or Mr. Ghorpade, M.L.A.) may be appointed to go into the question of undesirable advertisement and their control by legislation

Sd/- P.M.L. 28/10

Remembrancer of Legal Affairs

U.O. to H.D.(Poll.) No. 10614 dated the 6th November 1947.

SMT/9.5.

Office of the R. L. A.

Prosecution for receiving "stolen property" Indian Penal Code, 1860.

The facts of this case, as set out in the copy of the letter from the Prant Officer, Satara, at p.13, show that certain underground workers forced Tatya Ganu Kanse to execute a bogus promissory note for Rs. 1,500/- in favour of Govind Tukaram Kanse; and on 5-6-1946 Tatya Ganu was also forced to execute a bogus sale deed in favour of Govind Tukaram in satisfaction of the bogus promissory note of Rs.1,500/-. It also appears that thereafter possession of the land covered by the sale deed was taken by Govind Tukaram. The P.S.I. appears to have made a full investigation and submitted a report to the Mamlatdar and Magistrate, First Class, stating the facts in detail and suggesting the prosecution of the offenders under sections 306/34 of the Indian Penal Code which is a noncognizable offence. The Secretary, U.D., remarks that if the facts reported can be proved, it seems to him that it is possible to establish the offence of receiving stolen property against Govind Tukaram.

The R.L.A. is requested to advise.

2. "Stolen property" has been defined in section 410 as property the possession of which has been transferred by theft or by extortion. Section 383 defines "extortion" in the following terms:-

> "Whoever intentionally puts any person in fear of any injury to that person, or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person any property or valuable security or anything signed or sealed which may be converted into a valuable security, commits 'extortion'."

Illustration (d) to that section precisely covers the facts of this case which show that valuable securities of the kind of promissory note and sale deed were extorted from Tatya Ganu Kanse. It is true that the word "property" used in section 410 need not be restricted to moveable property only; in the other provisions of the Code where such limitation is intended, the qualifying adjective "moveable" has been inserted. However, it is plain that section 410, when it speaks of property the possession whereof has been transferred by extortion, must be read together with section 383 which defines "extortion".

When the two sections are so read together, it would follow that the property which section 410 has in view is the property the delivery of which has been accomplished by the fear and inducement contemplated by section 383. Section 383 itself contrasts property with valuable security. In this case what was delivered as a result of the fear and inducement was not the immovable property as such but the valuable securities, namely, the promissory note and the sale deed. Although, therefore, the immovable property in respect of which the sale deed was delivered ultimately came into the possession of Govind Tukaram by reason of extortion, it cannot strictly be said to be the property the possession of which has been transferred by extortion.

3. In these circumstances a prosecution under section 411 for the reception or retention of the the immovable property on the ground that it is stolen property would not appear quite feasible. The proper course would be to prosecute the persons concerned for extortion or for the person aggrieved to seek his remedy by a civil suit.

Sd/-

Remembrancer of Legal Affairs.

U.R. to H.D.(Spl.) No. 10771, dated- 11/11/47.

SHT/9.5.

Office of the R.L.A.

Regarding Article in the issue of Chitra dated 25.7.1947.

Indian Penal Code.

In the article under the caption "What more proof of inefficiency is needed" appearing in the morning edition of Chitra dated 25th July 1947 Mr. Chimanlal Shah has severely criticised the administration of the Supply Department as extremely inefficient and unreasonably negligent towards the public for which Mr.Dinkarrao Desai, the Bombay Supply Minister alone should be held responsible and consequently he must vacate his office in favour of a more efficient person or else the people will no longer tolerate him even if the Prime Minister has any consideration for him as a colleague, notwithstanding his inefficient administration. In the end Mr. Shah has made certain insinuation which is as follows :

> "It has come to our knowledge that a son of one of the present Minister is doing some business by taking advantage of his father's official position. This topic casually arose while we were talking with one officer in the Secretariat. He said that "one should strike the iron while it is hot". Those words of his are really surprising. Whatever it might be but at the present it is the duty of the people to teach a good lesson to the Supply Minister and make him aware of his responsibilities. If this is not done in time, he will not hesitate to cancel people to eat dust and grass".

The question for the consideration of the R.L.A. is whether the observations of Mr. Shahs that "a son of one of the present Ministers is doing some business by taking advantage of his father's official position" are defamatory.

Apart from the question whether these observations are intended to harm the reputation of the Hon'ble Minister concerned, in order to constitute an offence of defamation the words complained of must contain an imputation concerning some particular person or persons whose identity can be established. If the words complained of contain ~~xk~~ no reflection upon a particular individual or individuals but may may equally apply to others though belonging to the same class an action will not lie. (See Ratanlal's Law of Crimes, 16th edition,page 1220). The words complained of in the present case refer to minister whose identity cannot be established. No writing whatever is to be esteemed a libel unless it reflects upon some particular person. It seems difficult to maintain an action for defamation or a prosecution for that offence.

Sd/- P.M.Lad. 2/12

Remembrancer of Legal Affairs.

SMT/9.5.

U.S. to H.D.(Political), No. 11558, dated the 3rd December 1947.

The test of obscenity has been laid down by Cockburn C.J. in the case of R. vs. Hicklin as follows: "I think the test of obscenity is this: whether the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences and into whose hands a publication of this sort may fall". Judged by this test the poems to which objection has been taken cannot be said to be obscene. I have striven hard to collect the meaning of the passage in poem No. 45 at p.35. Even with the corrigendum which changes the word ~~viviparti-ation~~ to viviparitation, I cannot really make any sense out of that passage and I do not think that any ordinary reader will gather out of this passage anything which would suggest libidinous thoughts or inflame passion. The next poem is No. 47 at p.37. The description is a hackneyed one which we commonly come across in any love lyric. The object of the two next poems, No. 52 at p. 41 and No.56 at p.43, is not to inspire or even to suggest impure, libidinous or carnous thoughts They are written in a cynical vein and are intended to evoke in the reader a feeling of disgust for the pleasures of the flesh. The language used is no doubt disgusting and repulsive, but I feel that such language has been used advisedly to support the dominant sentiment of the poem which is sought to be re-inforced by the cartoon on the front cover. By "obscene" we do not mean in law disgusting, repulsive, filthy or foul. That was the original meaning of the word which is now somewhat archaic. The word is now used to denote something which is offensive to decency or expressing or suggesting unchaste or lustful ideas. On the whole, though the old language used by the author in the last two poems would shock the sense of propriety, it would be difficult to say that the poems are detrimental to public morals or are calculated to produce a pernicious effect in depraving or corrupting the minds of the persons into whose hands they may fall.

Sd/ P.N.L. 3/12

Remembrancer of Legal Affairs.

U.S. to H.D.(Poll) No. 44-Confl. dated 13th December 1947.

SHT /9.5.

Office of the B.L.A.

Disrespect to the National Flag.

Indian Penal Code,1860.

It appears that while sweetmeats were being distributed to the boys and girls in the School at Talebazar in Deoged Taluka in connection with the Independence Day celebrations, six persons mentioned in the letter of the District Magistrate,Ratnagiri, went there drunk and picked up a quarrel saying that the sweets were not given to them. They abused the persons assembled and proceeded to the place where the National Flag was hoisted. One of them pulled out the Flag,trampled on it and broke its pole. All of them also used insulting and offensive language against Mahatma Gandhi, Pandit Jawaharlal Nehru and other national leaders. The question raised for the consideration of the B.L.A. is whether on these facts these six persons can be prosecuted for the offence under section 124A of the Indian Penal Code.

To constitute the offence under section 124A of the Indian Penal Code the accused must be words, either spoken or written, or by signs, or by visible representation or otherwise bring or attempt to bring into hatred or contempt or excite or attempt to excite disaffection towards His Majesty or the Government established by law in the Indian Dominion means the existing political system as distinguished from any particular set of administrators. This expression denotes the person or persons authorised by law to administer executive Government in the Indian Dominion. (See section 17 of the Indian Penal Code). "National Flag" is an emblem of a Nation and not of Government so defined; and any dishonour done to the National Flag would be a dishonour done to the nation itself and not to Government. Consequently the dishonour done to the National Flag in the present case, however reprehensible, would not amount to the offence of sedition under section 124A of the Indian Penal Code. Compare Kamal Ganar V. Emperor, L.L.R.1930/Cal.458 at 460 there the same view was taken about the Union Jack.

Sd/- P.M.Lad.

10-12.

Remembrancer of Legal Affairs.

SMK/10-3.

U.O. to H.D. (Spl.) No.11904, dated the 10th Dec. 1947.

Office of the R.L.A.

Prosecution of Sardar Mansinhji for drawing false T.A. bills.

The charge against Sardar Mansinhji is that he drew two T.A. Bills in May 1943 for two different journeys which could not have been performed on the same date as mentioned in these bills. The defence of the Sardar Mansinhji appears to be that these bills were prepared by the office, one of which was enchhed in the month of May and the other in the month of June, and by mistake the figure '5' indicating the month in the latter bill was put instead of '6'. He called for certain records to explain the apparent discrepancy but these records could not be made available to him. The question for consideration is whether Sardar Mansinhji can be successfully prosecuted for having preferred two bills as stated above.

2. It appears that Government has no records to disprove the contentions of Sardar Mansinhji that the month mentioned in the 2nd bill was a mistake. In this bill he has drawn T.A. for journey performed from the 9th day of the month. If according to him, the figure of the month is a mistake and should have been '6' instead of '5' it follows that he has drawn T.A. for the journey performed by him from 9th June 1943. There is another bill which he has drawn for the journey performed by him from 31st May to 5th June 1943. Apparently, there is on record no other bill for any journey performed from 9th June 1943. It follows, therefore, that if the defence of Sardar Mansinhji is that the figure '5' indicating the month was wrongly mentioned for '6' in the second T.A.Bill, apparently, there is nothing to disprove it and the bill drawn for the journey performed by him from 31st May to 5th June 1943 goes to support him. In the absence of any other bill for the same period in June, a court is likely to hold that there was greater probability of a clerical error in putting the figure 5 instead of 6 rather than of fictitious details of the journeys being given. In that view the prosecution may not succeed.

Sd/- P.H.Lad.
Secretary to Govt.
Department of Legal Affairs.

SMM/10.5. U.O. to H.D.(Spl). No.459-Confl. dated the 22nd December,1947.